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March 23, 2010

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Hearing Officer's Decision*

Name of Case: Personnel Security Hearing

Date of Filing: October 30, 2009

Case Number: TSO-0846

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (the Individual) to retain his access authorization.<sup>1/</sup> The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual is eligible for access authorization.<sup>2/</sup> After reviewing the evidence before me, I find that the Individual's suspended access authorization should be restored.

***I. Background***

The Individual is employed by the Department of Energy (DOE). He was granted a security clearance in the early 1980s in connection with his employment at a DOE facility. In July 2008, the Individual was arrested for Driving Under the Influence (DUI).

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<sup>1/</sup> Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

<sup>2/</sup> Access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5(a).

Because this arrest raised legitimate security concerns, the Individual was summoned for an interview with a Personnel Security Specialist from the DOE's Local Security Office (LSO). After this Personnel Security Interview (PSI), the Individual was referred to a local psychiatrist for a DOE-sponsored evaluation. This evaluation took place on July 22, 2009. The psychiatrist (hereinafter referred to as "the DOE psychiatrist") submitted a written report to the local security office setting forth the results of that evaluation, finding no diagnosis for the Individual. Subsequently, after receiving the Individual's medical records, the DOE psychiatrist submitted a second report (hereinafter "revised psychiatric report") substantially changing her first report. She found that the Individual met three of the criteria necessary under the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV TR) for substance dependence. Therefore, she diagnosed the Individual as alcohol dependent.

After reviewing all of the information in the Individual's personnel security file, including the results of the interview and the revised psychiatric report, the local security office determined that derogatory information existed that cast into doubt the Individual's continued eligibility for a security clearance. The manager of the local DOE office informed the Individual of this determination in a letter that set forth in detail the DOE's security concern and the reasons for that concern. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the Individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The Notification Letter included a statement of derogatory information that created a substantial doubt as to the Individual's eligibility to hold a clearance. This information pertains to the Individual's diagnosis as alcohol dependent by the DOE psychiatrist, his July 2008 DUI arrest, and a January 1985 Driving While Intoxicated (DWI) arrest. Information of this type is defined as derogatory in paragraphs (h) and (j) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8 (hereinafter referred to as Criterion H and Criterion J).<sup>3/</sup>

The Individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals (OHA), and I was appointed the Hearing Officer. The DOE entered 24 exhibits into the record and presented the testimony of the DOE psychiatrist. The Individual entered two exhibits into the record and presented the testimony of five witnesses, in addition to testifying himself. The exhibits will be cited

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<sup>3/</sup> Criterion (h) refers to information indicating that an individual has "an illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h). Criterion (j) refers to information indicating that an individual has "[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse." *Id.* at § 710.8(j).

in this Decision as “Ex.” followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as “Tr.” followed by the relevant page number.

## ***II. Regulatory Standard***

### **A. The Individual’s Burden**

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. See *Dep’t of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the “clearly consistent with the interests of the national security test” for the granting of security clearances indicates that “security-clearance determinations should err, if they must, on the side of denials.”) *Dorfman v. Brown*, 913 F.2d 1399, 1403 (9<sup>th</sup> Cir. 1990) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

### **B. Basis of the Hearing Officer’s Decision**

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation or a person’s access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person’s access authorization eligibility in favor of the national security. *Id.*

## ***III. The Notification Letter and the Security Concerns at Issue***

As previously noted, the LSO cites two criteria as the basis for suspending the Individual security clearance, Criteria H and J. To support the criteria, the LSO relies on the DOE psychiatrist's opinion and the Individual's arrests for DUI and DWI.

Specifically, the DOE psychiatrist opined in the revised psychiatric report that the Individual is alcohol dependent. As of the date of the examination, the DOE psychiatrist determined that the Individual was neither reformed nor rehabilitated. The LSO was also concerned by the Individual's DUI arrest of July 23, 2008, and his DWI arrest of January 1985.

I find that the information set forth above constitutes derogatory information that raises questions about the Individual's alcohol use under Criteria H and J. The security concerns associated with Criterion H are as follows: "Certain emotional, mental, and personality conditions can impair judgment, reliability or trustworthiness." Guideline I of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines). The security concerns associated with Criterion J are as follows: "Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness." Guideline G of the Adjudicative Guidelines.

#### ***IV. Findings of Fact***

On July 23, 2008, the Individual was arrested for Driving Under the Influence (DUI). Ex. 1 at 1. The Individual reported the incident immediately. After a December 2008 PSI, the Individual was referred to a DOE psychiatrist for evaluation. The DOE psychiatrist met with the Individual on July 22, 2009, after which she issued a report finding that although he met two criteria for alcohol dependence, the Individual was not alcohol dependent, did not suffer from alcohol abuse, nor was he a user of alcohol habitually to excess. Subsequently, the DOE psychiatrist received and reviewed the Individual's medical records. After that review, she supplemented her report determining that he met a third criterion for alcohol dependence and therefore was alcohol dependent.<sup>4/</sup>

The Individual has been seeing his physician since 1998. Tr. at 28. They meet for routine physical examinations and any physical complaints. *Id.* At some point, the Individual complained to his physician of being lonely. Tr. at 31. The physician

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<sup>4/</sup> For a finding that a person is alcohol dependent, the DSM-IV TR requires that a person meet three of the seven diagnostic criteria. I note that a properly trained clinician can exercise his or her expert opinion based on training and experience and find that fewer than three diagnostic criteria may meet the alcohol dependence diagnosis under certain circumstances.

believed that he was exhibiting clinical signs of depression and prescribed various medications to treat the depression. Tr. at 32. None of the medications appeared to work for the Individual. Tr. at 32. In September 2008, the physician believed that the loneliness had resolved itself with the advent of a significant other in the Individual's life. Tr. at 42. In October 2006, during the time the physician had been treating the Individual, the Individual complained about his excessive alcohol consumption. Tr. at 31. The physician believed that the Individual's alcohol consumption was due to his loneliness. Tr. at 57, 41.

## *V. Analysis*

I have thoroughly considered the record of this proceeding including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the Individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c)<sup>5/</sup> and the Adjudicative Guidelines. After due deliberation, I have determined that the Individual's access authorization should be restored. I find that restoring the Individual's DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

### *A. The Individual's Use of Alcohol*

The Individual has been consistent over the years in describing his alcohol use to the DOE and his physician. He consumes between three and five beers during an evening. He does not consume alcohol every evening. He does not consume more than ten beers during a week. He claims he has had long periods of abstinence, which is confirmed by his priest, who is also a long-time friend and former roommate. Tr. at 199. For example, he did not consume any alcohol for five years when he first got married and was pursuing his master's degree. Despite his moderate alcohol consumption, he had expressed concern to his physician in October 2006 that he believed he was consuming alcohol in excess. Tr. at 31. His physician testified that he does not believe that to be the case for this Individual. Tr. at 31. He stated that the Individual has never come to his office smelling of alcohol or appearing to be hung over. Tr. at 31. Further, when the Individual underwent surgery and was hospitalized for six days, the Individual did not show any signs of alcohol withdrawal. Tr. at 30. The physician testified that the

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<sup>5/</sup> Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation, and other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant material factors.

Individual's blood tests showed that the ALT and AST levels were within the normal range.<sup>6/</sup> Tr. at 29. He pointed out that an AST reading that is twice as high as an ALT reading would indicate chronic alcohol ingestion. Tr. at 29.

Notwithstanding the information outlined above, I note that the Individual has also been arrested for two alcohol-related driving offenses, which occurred more than 20 years apart. The record before me clearly establishes a history punctuated with sporadic problematic alcohol use. In addition, his physician prescribed Revia, a drug used to combat alcohol abuse when combined with counseling.<sup>7/</sup> After the Individual reported excessive use of alcohol in September 2006, his physician spoke to him about Revia. Ex. 3 at 3. The Individual was actually prescribed Revia in November 2006. Ex. 3 at 3. In June 2007, the physician's notes indicate that the Individual agreed to *restart* Revia. Ex. 3 at 4. In August 2007, the physician suggested that the Individual stop taking Revia, because it could worsen his depression. Ex. 3 at 4. The physician testified, "I know I discussed Revia with him to help him cut back his alcohol consumption." Tr. at 37.

## B. Alcohol Dependence Diagnosis

In her initial report, the DOE psychiatrist found that the Individual had met two criteria for alcohol dependence (criteria 3 and 4).<sup>8/</sup> She found that the Individual was

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<sup>6/</sup> AST or aspartate aminotransferase and ALT or alanine aminotransferase are enzymes normally contained within liver cells. When the liver is injured for any reason, these enzymes are spilled into the blood stream.

<sup>7/</sup> There was a conflict in the testimony about whether the Individual or his physician first mentioned Revia as a way to curb the Individual's alcohol consumption.

<sup>8/</sup> The DSM-IV TR defines Alcohol Dependence as

A maladaptive pattern of [alcohol] use leading to clinically significant impairment or distress, as manifested by three (or more) of the following, occurring at any time in the same 12 month period:

- (1) tolerance, as defined by either of the following:
  - (a) a need for markedly increased amounts of [alcohol] to achieve intoxication or desired effect
  - (b) markedly diminished effect with continued use of the same amount of [alcohol]
- (2) withdrawal, as manifested by either of the following:
  - (a) the characteristic withdrawal syndrome for [alcohol] . . .
  - (b) [alcohol] is taken to relieve or avoid withdrawal symptoms
- (3) [alcohol] is often taken in larger amounts or over a longer period than was originally intended

consuming alcohol in larger amounts or over a longer period than he intended, thus fulfilling criterion 3. Ex. 5 at 13. She also found that the Individual was persistent in his desire to cut down or control his alcohol consumption, thus fulfilling criterion 4. Ex. 5 at 13. However, she summarized her report by finding that the Individual was not a user of alcohol habitually to excess nor was he alcohol dependent or suffering from alcohol abuse. Ex. 5 at 16.

After reviewing the Individual personal medical records, the DOE psychiatrist issued her revised psychiatric report and found that the Individual was alcohol dependent because he met three of the seven diagnostic criteria in the DSM-IV TR (criteria 3, 4, and 7). Ex. 3 at 6. She found that the Individual continued to consume alcohol despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by his alcohol consumption. Ex. 3 at 5-6. She based this finding on the fact that the Individual had been treated for depression, yet he continued to consume alcohol, which is a known depressant. She also believed that the Individual was being deceitful during their interview. Ex. 3 at 5; Ex. 5 at 15.

At the hearing, the Individual's physician testified that he disagreed with the DOE psychiatrist's diagnosis. He testified that he never told the Individual to stop consuming alcohol. Tr. at 32, 50. He testified that he was attempting to treat the Individual's depression so that he would not be lonely. Tr. at 50. The physician testified that he does not believe that the Individual's alcohol consumption was exacerbating his depression. Tr. at 50. He believes that the Individual's alcohol consumption was motivated by his loneliness. Tr. at 50.

The Individual's priest, who has a degree in counseling, testified that he agreed with the physician's assessment. The priest has known the Individual for 34 years, and has had constant contact with the Individual during that 34-year period. Tr. at 197, 210. They lived together while the Individual was attending college. Tr. at 199. The priest testified that he has a degree in counseling and works with many people who suffer from alcohol abuse or are alcohol dependent. Tr. at 196-97. He stated that the

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(4) there is a persistent desire or unsuccessful efforts to cut down or control [alcohol] use

(5) a great deal of time is spent in activities necessary to obtain [alcohol] (e.g., visiting multiple doctors or driving long distances, use the substance ..., or recover from its effects

(6) important social, occupational, or recreational activities are given up or reduced because of [alcohol] use

(7) the [alcohol] use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by [alcohol].

Individual does not share any characteristics with the people he works with regarding alcohol problems. Tr. at 202-03. Foremost, he opined that the Individual does not have an addictive personality, and has maintained sobriety for long periods. Tr. at 203, 206. He also related that when they get together, the Individual does not always consume alcohol. Tr. at 206.

An Employee Assistance Program (EAP) counselor also testified at the hearing. He has met with the Individual eight times during the past two years. He testified that the Individual is very guarded with strangers. He believes this guardedness was what the DOE psychiatrist thought to be deception. He testified that what the Individual shared with him during their counseling sessions was consistent with the medical reports provided by the physician. The EAP counselor testified that alcohol is not a driving force in the Individual's life. Tr. at 165. He testified that he has no concern that the Individual is consuming alcohol in excess. Tr. at 192. Finally, he concluded that he was concerned that the DOE psychiatrist based her diagnosis on the medical records without calling the Individual's physician. Tr. at 169.

The DOE psychiatrist and the Individual's witnesses disagree on a diagnosis. The physician testified that he never told the Individual to stop consuming alcohol. I found him to be a credible witness. When I questioned the DOE psychiatrist about whether she believed the physician had testified truthfully regarding the Individual's alcohol consumption, she stated that she did not. Tr. at 229. I noted from the record that the physician has a practice where he sees hundreds of patients. It strains credulity to believe that he would risk his medical license to testify falsely on behalf of one patient. The physician testified that his records do not reflect what the DOE psychiatrist claimed that they reflect. I find that the physician is the most knowledgeable about the contents of the medical records relating to the Individual which he generated.

In addition, I find that the Individual's priest was being sincere and honest in his testimony. He testified that he does not condone lying because lying to someone else is essentially lying to yourself, especially in a counseling situation. Tr. at 208. He stated that the Individual has been very honest and open with him. Tr. at 208. He does not believe that the Individual has a problem with alcohol. He testified that he has never seen the Individual consume alcohol to excess. He does not believe the Individual has an addictive personality, which he normally sees in alcohol dependent persons.

Finally, I found the EAP counselor's testimony to be compelling. The EAP counselor has been in at least eight counseling sessions with the Individual during the past year. He testified that he does not believe the Individual to be alcohol dependent. Further, he testified that

from a black and white standpoint, to say he is not knowledgeable about the detrimental effects of alcohol, that would be insane. He grew up in an environment where it's rampant. He's seen it firsthand. He knows it's



bad. He went to [his physician] to get help for his anxiety and his depression, and he had questions about this. Now, how much was he drinking, you know? Was he within the normal limits? It's not quite as simple as just saying, yeah, does he have knowledge that alcohol is bad for him. Of course he does. Does that meet this criteria? I do not think so.

Tr. at 185.

I understand the DOE psychiatrist believes that the medical records reflect that the Individual had knowledge that alcohol exacerbated or caused his depression. The evidence in this case suggests otherwise. The physician testified credibly that he never told the Individual to stop consuming alcohol. Further, the physician provided compelling testimony that the Individual's depression was caused by his loneliness, not exacerbated by his alcohol consumption. While the DOE psychiatrist believes that the Individual knew, without being told by his physician, that alcohol was harmful for him, I am not convinced that the Individual knew that his alcohol consumption may have been exacerbating or causing his depression, as required by the criterion relied upon by the DOE psychiatrist.

This is an unusual case in that the record is clear here that the pivotal question regarding the appropriateness of the alcohol dependence diagnosis is whether the Individual continued to consume alcohol despite knowing that his alcohol use was exacerbating his depression. The testimonial evidence before me as outlined above convinces me that criterion 7 of the DSM-IV TR for alcohol dependence does not apply. Without criterion 7, only two criterion for alcohol dependence are present. Even the DOE psychiatrist acknowledged in her first report that the two criteria were not sufficient in this case. Moreover, the DOE psychiatrist never stated that she was exercising her clinical judgment to find that the Individual is alcohol dependent. Based on the evidence before me, I find that the Individual has mitigated the security concerns associated with Criteria H and J.

## *VI. Conclusion*

As the foregoing indicates, the Individual has resolved the security concerns cited in the Notification Letter under Criteria H and J. Therefore, I conclude that the Individual has shown that restoring his access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual's access authorization should be restored at this time. The parties may seek review of this decision by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Janet R. H. Fishman  
Hearing Officer  
Office of Hearings and Appeals

Date: March 23, 2010